No. 9251.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS and FRANK E. NELSON,

Appellants,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee,

and

BRADY IRRIGATION COMPANY, a corporation,

Appellant,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee.

PETITION FOR AND BRIEF IN SUPPORT OF PETITION FOR REHEARING

R. H. GLOVER,
S. B. CHASE, JR.,
JOHN D. STEPHENSON,
410 First National Bank Building,
Great Falls, Montana,
Attorneys for Appellee-Petitioner.

Filed ..... 1940.

..... Clerk.

INDEX TO CASES

INDEX

No. 9251.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS and FRANK E. NELSON,

Appellants,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee,

and

BRADY IRRIGATION COMPANY, a corporation,

Appellant,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee.

PETITION FOR AND BRIEF IN SUPPORT OF PETITION FOR REHEARING

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, and THE HONORABLE JUDGES THEREOF:

Comes now WINSTON BROTHERS COMPANY, a corporation, Appellee in the above-entitled cause, in which judgment was rendered by this court on July 17, 1940, remanding the cause to the District Court, and within thirty days thereafter, files this its petition and brief in support of petition for rehearing, and for grounds thereof, respectfully represents:

I.

That the Appellate Court in basing its majority opinion on the public character of the service that the Reservoir Company performs to the land in the Bynum District (page 13 of printed opinion) has overlooked the fact that the service is not a service for use by, or actually used by the public generally, but only by a few individuals who own land in the district, and that the Bynum Irrigation District is not a governmental agency in the true sense, but only an association of landowners given power to levy assessments for the purpose of getting their lands under irrigation, and has not considered the Montana case of Buffalo Rapids Irrigation District v. Colleran, 85 Mont. 466, 279 Pac. 369.

ARGUMENT.

The Bynum Irrigation District is a district created pursuant to Section 7166 to 7264.18 Revised Codes of Montana of 1935. Briefly, the statutory provisions provide for the creation of a district by the District Court on petition of landowners. The Commissioners of the

District must be residents of it (Section 7170) and are elected by vote of the electors of the District (Section 7176). These Commissioners are vested with full powers of management of the District (Section 7174) including the right to levy an assessment for the payment of debts and expenses (Section 7232 ff.). They cannot issue bonds or levy an assessment for the payment thereof, without proper proceedings in the District Court (Section 7211).

As appears from *Thaanum vs. Bynum Irrigation District,* 232 Pac. 528, 72 Mont. 221, on page 223, the Bynum Irrigation District was organized to irrigate some 25,000 acres, amounting in all to some thirty-nine square miles, or only three square miles more than one township.

The owners of this amount of land are the "public" served by the Teton Cooperative, and the public character of the service, which this Court held prevents execution for payment of this judgment against the Teton Cooperative for construction and enlargement of the reservoir, is the furnishing of water to be used by the owners of a little more than one township of land.

We do not mean to decry the value of the water or the desirability of irrigation; but the only sense in which the "public" or the State is interested is in the increase in production and the increase in community welfare and purchasing power. So far as this feature is concerned, there is no sound practical distinction between the landowners in the Bynum Irrigation District and the shareholders in the Brady Irrigation Company.

Indeed, there are a number of ways in which the same result can be accomplished.

1. A private landowner may appropriate water for irrigation.

2. A group of water appropriators may build a ditch jointly and convey the water which they own to their lands.

3. The same group might form an association or corporation for the same purpose, and, if it owned water rights or the right to use water, the situation would be similar to that of Brady Irrigation Company.

4. A water user's association, having a contract with the United States Government and with its shareholders, would have the right to levy assessments (Section 7160 R. C. M. 1935).

5. A statutory irrigation district, like the Bynum Irrigation District, might be formed.

These are only some of the ways in which the same result—getting water on the land—might be accomplished.

The appropriation of water for irrigation of a private farm is a public use.

Montana Constitution Article III, Section 15; and *Ellinghouse vs. Taylor,* 52 Pac. 204, 19 Mont. 462, in which case the court said on page 464:

> "What real distinction is there, so far as the term 'public use' is concerned, between the benefit that results to a state from the reclamation by artificial irrigation of 160 acres of agricultural land owned by one or two persons, and the reclamation by the same means

of thousands of acres owned by many different persons living together in one subdivision of the state? We do not think there is any in principle. The reclamation of one small field by means of artificial irrigation promotes the development and adds to the taxable wealth of the state as well as the reclamation by the same means of a number of fields. The only difference is the extent of the benefit."

Section 7201 of the Revised Codes of Montana of 1935, provides that the use of all water for irrigation of lands in an irrigation district is a public use, but this is equally true of an individual appropriation. As stated in the Ellinghouse case, the question is merely one of degree.

As in every case, the particular facts of the particular case must decide. It is respectfully submitted that the furnishing of water for the irrigation of twenty-five thousand acres, regardless of the form it takes, is not service of the public character of sufficient importance to warrant the holding that its property is exempt from execution, particularly in the face of the statutory law and the Montana decisions which will be discussed in Subdivision II of this petition.

Before passing to that subject, however, we call the attention of the court to three cases bearing directly on the point now under discussion. The first is *Board of Directors vs. Peterson,* 4 Wash. 127, 29 Pac. 995, where on page 997 of the Pacific Reports the court says:

"The improvement contemplated in the creation of the district is a local one, in the interest of property benefited, and has nothing whatever to do with the taxing power."

The second case is *Board of Directors of Payette-Oregon Slope Irrigation District vs. Peterson,* 64 Ore. 46, 128 Pac. 837. The serious question there presented was as to the qualifications of electors within the district. In the course of considering this question it became important to determine the nature of an irrigation district, as, if the organization was municipal, the qualifications of its electors would be certain ones prescribed by the Constitution. The court said on page 839:

> "On the contrary, in the irrigation districts provided for here only the land is benefited or burdened, and only the landowner has any interest in the choice of its officers, or is in any way concerned in their acts. The management of the district affairs is solely of the irrigation project in the private interest of the landowners, and therefore the apparent reason for and purpose of the requirements of section 2, art. 2, as applicable to elections in municipal or quasi municipal corporations, fails in the case of the irrigation districts."

This latter case was cited with approval by the Supreme Court of Montana in *Buffalo Rapids Irrigation District vs. Colleran,* 279 Pac. 369, 85 Mont. 466. The case is cited on page 479 and in this connection the court says commencing on page 478:

> "An irrigation district is neither supported by appropriation of public funds, by taxation, or by private donation. True, funds for the maintenance and operation of the district are raised by assessments levied against the property within the district, but these levies are in the nature of special assessments for local improvements (In re Valley Center Drain District, 64 Mont. 545, 211 Pac. 218), entirely distinct from general taxes for state, county, school district, and municipal purposes (Lainhart v. Catts, 73 Fla. 735, 75 South.

47); they may even be levied against public property in spite of the constitutional exemption (State ex rel. City of Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638; City of Kalispell v. School District, above); and no part of the revenue derived therefrom reaches the coffers of the state or its political subdivisions organized for governmental purposes.

Further, while it is declared that irrigation districts are created to promote the welfare of the state, the state as a whole, the counties and school districts within which such districts may lie are benefited only incidentally by reason of the increased valuations placed on the lands within the districts because of the special improvements made thereon and the increased prosperity of the owners of the land. The direct benefit accrues to the land improved and the owners thereof. (Boards of Directors of Payette Oregon Irrigation District v. Peterson, above). *Irrigation districts are not created with a view to benefit the state or to organize a corporation for the discharge of governmental functions in addition to, or in aid of, the usual governmental departments or agencies, but in order to promote the material prosperity of the few owning property within their boundaries just as truly as are manufacturing plants established or mines and oil wells developed. In so far as each of these projects bring into being new sources of revenue to the state, they promote the welfare of the state, but the mere production of additional values or property does not, in itself, warrant the exemption of the property from taxation, so long as that production is accomplished for private gain.*" (Emphasis supplied).

That case will be more fully discussed in the next subdivision of the brief as it involves exemption from taxation of property of an irrigation district. But it is to be noted that what is said in the above quotation,

and particularly the portion emphasized, directly supports the arguments made under this subdivision and removes the property of an irrigation district from any rule exempting property from execution because of its importance to the public generally, or because it is property of a governmental agency used in governmental affairs.

II.

That the Appellate Court, in basing its majority opinion on the proposition that although not specifically exempted by statute, the property in question was nonetheless exempt for the reason that,

> "To argue that the state actually intended to exempt property used by the counties and cities and towns from foreclosure of liens and to permit foreclosure upon property belonging to the state or used by the sovereign authority of the state for public purposes would be extending the meaning of 10703 Rev. Stat., supra, far beyond any possible remedial purpose sought to be effected by its enactment. In view of the extraordinary effect such a construction would have upon the powers of the state to protect its own property and activities, we can but arrive at the conclusion that no such construction was ever intended and that the legislature was laboring under some misapprehension that the sovereign power referred to herein and which by implication is reaffirmed by 10703 R. S. M., did not extend to counties and cities and towns." (See page 12 of printed opinion of this Court)

did not take into consideration certain Montana statutes and decisions not called to its attention for the reason that the proposition was not argued in the prior proceeding.

ARGUMENT.

These statutes and decisions are as follows:

1. Although property of a county is expressly exempt from execution, Section 4450 provides for the payment and collection of judgments against counties.

2. Sections 5084 and 5085 cover the same situation with regard to cities and towns.

3. The State of Montana may not be sued without its consent, (State ex rel. Freebourn vs. Yellowstone County, 108 Mont. 21 at 27, 88 Pac. (2d) 69) and hence no judgment is possible unless the state has consented to be sued. Provision for allowance or rejection of claims against the state by its Board of Examiners is made by statute. (Sections 238 ff.) In case of claims for which no appropriation is made, the Board of Examiners must audit the claim and if they approve it, transmit it to the Legislative Assembly with a statement of their approval. (Section 241.)

The opinion of this court indicates on page 12 that it is the opinion of this court that in connection with the enactments with reference to exemption from execution, the Legislature had not covered the situation sufficiently to protect the State from having a levy of execution against its property.

An examination of the statutes shows that the situation is thoroughly covered. The Legislature had no occasion to mention state owned property in the exemptions, for there was adequate provision made for the payment of claims against the State, and no possibility

of any judgment issuing on which an execution could be based. The enactments as to the payment of claims against counties and cities and the payment of judgments against them show a determination on the part of the Legislature that they should not hide indefinitely behind the statutory exemption from execution.

The legislation, taken as a whole, shows a well-rounded, complete and definite program on the part of the Legislature to exempt certain public properties in cases where the agency could be sued, but to make adequate provision for payment of any judgment that might be obtained against such agency, together with adequate provision for payment of just claims against the state, even if it were not subject to suit. The Legislature did not, directly or by any reasonable implication, exempt the property of an irrigation district, and it must always be borne in mind that we are not now concerned with the property of an irrigation district but with the property of a private corporation, a majority of the stock of which is held by an irrigation district.

4. The case of *Buffalo Rapids Irrigation District vs. Colleran, 85 Mont. 466, 279 Pac. 369*, cited above, is closely analagous on this feature of the case. Had it been anticipated that the case would take the turn which it did, this case would have been called to the attention of the court in the brief on appeal. It appears from the opinion in that case, that the irrigation district had acquired title to certain land within the district because of the failure of the owner of the land to pay assessments. The

question to be considered by the court is stated as follows on page 469 (reference to pages in this case will refer to the Montana Report):

> "Has Custer County the power to assess and levy a tax upon the land of the plaintiff, the plaintiff being an irrigation district organized under the laws of the State of Montana?"

The court stated that the answer was to be found in the constitutional and statutory provisions on the subject. The Legislature had undertaken, by what is now section 7209, to exempt from taxation the bonds issued under the Act for irrigation districts, and rights of way, ditches, flumes, etc., belonging to any irrigation district.

In the Buffalo Rapids case the court stated that an irrigation district was "a public corporation for the promotion of the public welfare." It then continued as follows:

> "But the mere fact that such a district is a public corporation created for the purpose stated does not neccessarily exempt its property from taxation; if such property is to be exempted, it must be by virtue of the express pronouncement of the Constitution or legislative declaration permitted by the Constitution." (Page 470).

The court then quoted the provisions of the Constitution, Article XII, section 2, which provides that "the property of the United States, the state, counties, cities, towns, school districts, municipal corporations and public libraries" should be exempt from taxation. Special attention is called to this paragraph of the opinion which

is the second full paragraph on page 470. After quoting this provision the court adds "that is, public property." And the court then says "as to this class the provision is self-executing and mandatory." The second provision as to the exemption in the Constitution related to charitable and educational societies which was not thereafter seriously considered. The court then continued on page 470:

> "It will be noted that 'public corporations' are included in neither of these classes, unless, as contended by counsel for the plaintiff, irrigation districts, as public corporations, fall within the designation 'municipal corporations,' *or are such component parts of the state that it may be said that their property is the property of the state.* The very fact that the framers of our Constitution wrote into the fundamental law an exemption of the public property enumerated is recognition of the principle that, without such exemption, it would be subject to taxation (City of Kalispell v. School District, 45 Mont. 221, Ann. Cas. 1913D, 1101, 122 Pac. 742), and therefore the rule 'expressio unius est exclusio alterius' applies." (Emphasis supplied).

In discussing these statutes and the rules of statutory construction, the court says on page 471:

> *"Provisions for exemptions must be construed strictly; nothing is to be implied (Cruse v. Fischl, above); this rule applies to exemptions of public as well as private property* (Sanitary District v. Gibbons, 293 Ill., 519, 127 N. E. 691), and anyone seeking immunity from taxation must show that his property belongs to a class which is specifically exempted (City of Kalispell v. School District, above)." (Emphasis supplied).

On page 472 it is stated that an irrigation district is

not a state, county, city, town, or municipality, the court saying:

> "Where, then, does the property of an irrigation district fit into our constitutional provision so as to entitle it to exemption? It is neither the state, a county, city or town (Thaanum v. Bynum Irr. Dist. 72 Mont., 221, 232 Pac. 528), and, in that opinion, it is emphatically declared that such a district is not a 'municipality,' for the term is synonymous with 'municipal corporation,' 'and in this state only incorporated cities and towns are municipal corporations (Hersey v. Neilson, 47 Mont. 132, Ann. Cas. 1914C, 963, 131 Pac. 30)."

After pointing out on page 473 that a word or phrase may have different meanings as it is employed in different connections, the court says:

> "The plaintiff district is entitled to have its property exempted only if, under the above rules, it can be said it clearly comes within the term 'municipal corporations,' *or that it is such a subdivision, institution or department of the state as to constitute its property the property of the state,* or that, under some appropriate designation, within the second class mentioned in the constitutional provision, its property has been exempted by statute." (Emphasis supplied).

After discussing several cases from other jurisdictions, the court came to the following conclusion on page 476:

> "It cannot be said that the term 'municipal corporation' is used in any different sense in section 2, Article XII, above, than is its synonymous term 'municipality' in section 1 of Article XIII, considered in Thaanum v. Bynum Irrigation District, above, and on this authority, and for the further reasons hereinafter given, *we hold that the property of an irrigation district is not exempt from taxation under the specific provision*

exempting the property of municipal corporations." (Emphasis supplied).

The court then turns to the other contentions of the plaintiff which were in effect that the irrigation district is an integral part of the state so as to render its property exempt from taxation on the theory that it is in fact property of the state. This argument is very similar to the theory of this court in its decision that the property was exempt from execution, although not specifically stated to be exempt by the statute. As we read the opinion of this court, it is based on the proposition that the irrigation district is such a governmental agency that even though it is not specifically exempted, it must be held to be exempt because it is in effect the property of the State of Montana. The Supreme Court of this state dealt as follows with such an argument on page 476:

> "*But neither the statute nor the opinion cited conveys the idea that an irrigation district is such an integral part of the state as to render its property exempt from taxation on the theory that it is in fact the property of the state; on the contrary, the enactment discloses the legislative intent that only such property of an irrigation district as is used for governmental purposes should be exempt, and further, had the legislature had in mind that the property of such a corporation came within the phrase 'property of * * * the state,' that body would not have felt called upon to enact the statute, for as to such property the constitutional provision is self-executing, and the decision questions the power of the legislature to exempt such property.*" (Emphasis supplied).

And on page 477 the court said:

"It would seem that, in order to come within the rule which will permit the court to consider the property of a public corporation the property of the state for the purpose of exemption from taxation, *such corporation should be so closely engrafted upon the state as to in fact exercise governmental functions and be supported, directly or indirectly, by the state.*" (Emphasis supplied).

Another feature of the Colleran case deserves special attention. In 1909 the Montana Legislature passed an act, which is now Section 7209 of the Revised Codes, which provides in part that

" 'the bonds issued under the provisions of this Act, rights-of-way, ditches, flumes, pipe-lines, dams, water-rights, reservoirs, and other property of like character, belonging to any irrigation district, shall not be taxed for state, county, or municipal purposes.' "

The Montana Supreme Court, on page 476 of the Colleran case, after quoting the above language, said

"Of this section Mr. Justice Holloway, speaking for the court in Crow Creek Irr. Dist. v. Crittenden, 71 Mont., 66, 227 Pac. 63, had this to say: 'Whether the legislature had the authority to declare such an exemption may be questioned, but no one can be in doubt that it was dealing with an irrigation district as a part of the state itself rather than as an enterprise fostered by the state,' and it is there held that such a district is a subdivision of the state within the meaning of section 4893, Revised Codes of 1921, relieving subdivisions of the state from the payment of recording fees."

It is of this statute that the court was speaking when it stated on pages 476 and 477:

"But neither the statute nor the opinion cited conveys the idea that an irrigation district is such an integral part of the state as to render its property exempt from taxation on the theory that it is in fact the property of the state; on the contrary, the enactment discloses the legislative intent that only such property of an irrigation district as is used for governmental purposes should be exempt, and further, had the legislature had in mind that the property of such a corporation came within the phrase 'property of * * * the state,' that body would not have felt called upon to enact the statute, for as to such property the constitutional provision is self-executing and the decision questions the power of the legislature to exempt such property. But, whether that statute is valid or not, it cannot avail the plaintiff here, as the property in question is not included in the statutory exemption."

The logic of the reasoning of the court seems unanswerable. If the legislature had regarded the property as property of the State, it never would have passed the Act. Moreover, doubt as to the constitutionality of Section 7209, so far as it exempts the specified property of the District, was voluntarily expressed by the Supreme Court in both the Crow Creek and Colleran cases, which clearly shows that the court did not consider the dams, reservoirs, and other enumerated property of the District, to be state property or public property.

Applying the analogy to the case at bar, only property specifically exempted by statute is exempt from execution on a judgment. (Section 9424). State property is not mentioned, nor should it be, for the State may not be sued, hence no judgment for damages can be recovered against it. There is no prohibition in the statutes of a

suit against an Irrigation District, and no exemption in the statutes of its property.

The Colleran case is direct authority for the proposition that, apart from the statute, there could be no exemption of any property of a District from taxation. The same principles apply in the present case; not being exempt by statute, and being, as our Supreme Court has said, created "in order to promote the material prosperity of the few owning property within their boundaries" there is no reason to hold the property of irrigation districts exempt from execution, and, *a fortiori,* even less to hold property of the Teton Cooperative exempt.

We point out again that the statutes of Montana provide that only property specifically exempted shall be exempt from execution (Section 9424), and that this property is not so exempt (Section 9427); that this principle applies to public property as well as private property, (Colleran case, p. 471); that the exemption statute declares the policy of the State that no property is exempt from execution on a judgment recovered for its price (Section 9427), and that the judgment in this case is in effect such a judgment.

We respectfully submit that, in the light of the decisions and statutes referred to, the holding of this court that this property may not be sold on execution, at least so far as it is connected with Bynum Irrigation District, trenches very close upon judicial legislation in a situation where adequate provision has been made by the Legislature and its policy expressly declared to be that

of limiting property exempt from execution to property specifically so exempted.

This court has properly held in *Smith Engineering Co., v. Rice,* 102 Fed. (2d) 492, that where the common law is repugnant to Montana statutes, it does not exist in Montana. In the case at bar this court held "that the exemption statute does not act to declare the law as to foreclosure of liens upon the property involved in this case" (opinion page 12), but we submit that the statutes and decisions herein referred to compel a different conclusion.

Moreover, even if the court should hold that, despite absence of statutory exemption, state property cannot be sold, the Colleran case is direct authority that property of an Irrigation District is not such property.

We sincerely feel that the dissenting opinion is correct and that the statutory law of the State of Montana must govern. What has been said above in this brief clearly distinguishes this situation from the case of *Northern Pacific Railroad Company v. Schimmell,* 6 Mont. 161, 9 Pac. 889, which is based upon the proposition that the jury had found that the safe was a necessary part of the equipment for the purposes of the business, and that the franchise having been given by act of Congress making the road a military and post road, property necessary to its successful operation could not be seized.

Moreover, it is pointed out in the dissenting opinion, it was decided prior to the enactment of section 10703.

It is respectfully submitted that the considerations set forth in this petition warrant a rehearing.

WHEREFORE, upon the foregoing grounds and upon the basis of the argument hereinabove made, it is respectfully urged that this petition for rehearing be granted, and that upon further consideration the judgment of the lower court may be affirmed.

Respectfully submitted.
R. H. GLOVER,
S. B. CHASE, JR.,
JOHN D. STEPHENSON,
Attorneys for Petitioner,
410 First National Bank Building,
Great Falls, Montana.

* * *

STATE OF MONTANA,
COUNTY OF CASCADE. } ss.

JOHN D. STEPHENSON, being first duly sworn upon oath deposes and says:

That he is one of the attorneys for the appellee-petitioner named in the foregoing petition; that no officer of said appellee petitioner is within the County of Cascade where affiant resides and where this verification is made, and that he therefore makes this verification for and on behalf of said petitioner. That he has read the foregoing petition, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

JOHN D. STEPHENSON.

SUBSCRIBED AND SWORN TO before me this day of August, 1940.

MARGARET C. INNES,
Notary Public for the State of Montana. Residing at Great Falls, Montana. My commission expires August 4, 1942.

* * *

CERTIFICATE OF COUNSEL

I, the undersigned, do hereby certify that I am a counsel in the above-entitled cause for the above-named petitioner, WINSTON BROS. COMPANY, a corporation; that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

JOHN D. STEPHENSON.